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July 10, 2015

VIA ELECTRONIC MAIL AND U.S. MAIL

Mr. Bruce Wolfe
Executive Officer
California Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA. 94162
mrp.reissuance@waterboards.ca.gov

Re: San José Legal Comments to Tentative Order
Municipal Regional Stormwater Permit 2.0/NPDES Permit
No. CAS612008

Dear Mr. Wolfe:

These legal comments on the Tentative Order for NPDES Permit No. CAS612008 dated May 11, 2015, are submitted on behalf of the City of San José. As you know, the City of San José is one of the Santa Clara Valley Urban Runoff Pollution Prevention Program ("SCVURPPP") co-permittees that would be covered by the Municipal Regional Permit ("MRP"), and is the largest city among the SCVURPP co-permittees. These legal comments supplement the technical comments on the Tentative Order which are being submitted under separate cover by the City's Environmental Services Department on behalf of the City departments that will be tasked with implementing and reporting compliance with the Municipal Regional Stormwater Permit.

In addition to this brief summary of San José's specific legal comments, we support and incorporate by reference herein the legal comments submitted by Robert Falk of Morrison & Foerster for SCVURPPP dated July 9, 2015.

San José has several legal objections to the Tentative Order that are common to most of the provisions identified in our technical comments. These legal objections and the most significant provisions affected by the objections are addressed below as "General

Legal Comments.” In addition, we have additional legal objections which affect a fewer number of the provisions; and these are identified below as “Specific Legal Comments.”

General Legal Comments

There is Insufficient Evidence in the Record Demonstrating That the Provisions Are Practicable or Necessary to Protect Water Quality.

We do not believe that the record demonstrates that many of the provisions identified in the City’s technical comments meet either the “nexus” requirement that is required under the Porter-Cologne Act (Cal. Water Code §§13241 and 13263) or the maximum extent practicable (“MEP”) standard, which is the applicable statutory standard governing the substance of permits regulating municipal stormwater discharges under the Clean Water Act (“CWA”). Many of the provisions referenced in the City’s technical comments are deficient under these standards. Of special concern are provisions that are costly or will increase workload or with no demonstrable water quality benefit, such as Provisions C.2 and C.3.

The Provisions Impermissibly Specify The Manner of Performance.

The Porter-Cologne Act specifically prohibits the Board from specifying the “design, location, type of construction, or particular manner in which compliance may be had” Cal. Water Code §13360. Most of the provisions in the Tentative Order violate this prohibition by prescribing, sometimes in minute detail, how the City should conduct municipal operations or operate local programs, or even what ordinances must be adopted by the City Council. The overly prescriptive nature of the provisions related to exempted and conditionally exempted and provisions which do not sufficiently allow for Adaptive Management discharges [Provisions C.3, C.5, C.6, C.9 and C.15].

The Provisions Constitute an Unfunded Mandate.

The legal basis for the City’s unfunded mandate objection, including an analysis of why many of the provisions included in the City’s technical comments go beyond the requirements of the federal CWA, is set forth in Mr. Falk’s comment letter.

The Water Board Has Failed to Sufficiently Consider the Economic Impacts of the Provisions.

For the provisions in the Tentative Order that go beyond requirements of the federal CWA, the Water Board is required to conduct an analysis of economic impacts and burdens pursuant to sections 13241 and 13263 of the Porter-Cologne Act. See *City of Burbank v. State Water Resources Control Board*, 35 Cal. 4th 613 (2005). Although the Fact Sheet (Attachment A to the Tentative Order) purports to contain an economic analysis, the studies cited are over 10 years old and do not address the requirements of

this Tentative Order. Moreover, the Fact Sheet contains no analysis of the extent to which the programs included in those studies, which are primarily Southern California based, are comparable to the requirements in this Tentative Order. As indicated in more detail in the City's technical comments, specific provisions that are of particular economic concern to San José include: Provisions C.3, C.10, C.11 and C.12.

Issuance of the Tentative Order Is Subject to CEQA.

The California Environmental Quality Act (CEQA) applies to permits issued by the Water Board to the extent the permit contains provisions that are not required under the federal CWA. *City of Arcadia v. State Board*, 135 Cal. App. 4th 1392 (2006). The Tentative Order requirements exceed the CWA Mandates as Mr. Falk aptly stated. The need for a CEQA analysis is particularly relevant for provisions which specify the manner in which the permittees can and cannot construct public improvements and those which require the permittees to implement specific public improvement projects.

Specific Legal Comments

Some Provisions Exceed the Water Board's Statutory Authority and Impermissibly Impinge on Local Land Use Authority.

As a state agency, the Water Board only has the regulatory authority delegated to it by statute. The scope of this delegated authority does not include jurisdiction over local land uses decisions under state or federal law. Provision C.3 of the Tentative Order contains numerous instances where the Water Board is exceeding its statutory authority, with Provision C.3.b.i being of specific concern as indicated in the City's technical comments.

Some Provisions Are Outside the Scope of the Board's Permitting Authority for the City's Storm Sewer.

The Water Board is also limited in this proceeding to dealing with municipal storm water discharges. There are several provisions in the Tentative Order that attempt to regulate activities simply on the basis of impact on water quality, even though there is no demonstrated connection between these activities and the permittees' storm sewer systems, including Provisions C. 5, C. 6, C. 9 and C.12.

Moreover, the Tentative Order exceeds its permitting authority by mandating in C.9. that the permittees lobby EPA with respect to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act.

CONCLUSION

We appreciate the opportunity to submit these legal comments on the May 11, 2015 Tentative Order and look forward to your thoughtful consideration of both the legal and substantive issues that San José has raised in this proceeding to date.

Sincerely yours,

RICHARD DOYLE, City Attorney

By: 
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